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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
GARY LEE HARDEMAN, )  
 )  
Defendant. )

No. CR 10-0859 RS

THE UNITED STATES' OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
COUNT ONE OF THE INDICTMENT

Date: June 7, 2011  
Time: 2:30 pm  
Place: Courtroom 3, 17th Floor

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## INTRODUCTION

Defendant Gary Hardeman asks the Court to dismiss Count One of the Indictment against him, which charges him with Engaging in Illicit Sex in Foreign Places in violation of 18 U.S.C. § 2423(c), because he claims that the statute, insofar as it criminalizes non-commercial sex acts in foreign countries, oversteps Congress's powers under the Foreign Commerce Clause of the U.S. Constitution. Hardeman's argument runs contrary to both Supreme Court and Ninth Circuit authority in this area, and to the consistent and persuasive holdings of federal courts across the nation. In rejecting Hardeman's position, the Court should take particular guidance from the Ninth Circuit's opinion in *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006), which suggested that the defendant's use of a channel of foreign commerce was sufficient to bring 18 U.S.C. § 2423(c) within the bounds of Foreign Commerce Clause authority.

Hardeman's reasoning comes not from legal precedent but from a single law review article that challenges the breadth of Foreign Commerce Clause authority granted Congress by numerous federal court decisions. But this article suggests a scheme that has not yet been adopted by any federal court, to this writer's knowledge.

Uniform and logically coherent legal precedent supports Congress's power, under the Foreign Commerce Clause of the U.S. Constitution, to pass a law that prohibits American citizens from traveling overseas and having sex with children. The Court should deny Hardeman's motion.

## FACTUAL AND PROCEDURAL BACKGROUND

Defendant Gary Hardeman faces a two-count Indictment charging him with traveling to Mexico between October and December, 2007, and engaging in illicit sexual conduct with a minor, while being required to register as a sex offender under state law. Although the indictment does not charge any specific type of illicit sexual conduct, Hardeman assumes that he has been charged with "non-commercial" sexual conduct, meaning sexual conduct that does not constitute a "commercial sex act" within the meaning of 18 U.S.C. § 2423(f)(2). A "commercial sex act" means "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(e)(3). From the tenor of Hardeman's motion, it appears that he

1 would concede the statute's constitutionality if a jury were to find that he had, or had attempted  
2 to, engage in a sex act after giving something of value to his victim.

### 3 ARGUMENT AND AUTHORITIES

#### 4 I. CONGRESS'S BROAD POWER TO REGULATE FOREIGN COMMERCE.

5 The United States Constitution, at Article I, Section 8, Clause 3, grants Congress the  
6 power "[t]o regulate Commerce with Foreign Nations, and among the Several States, and with  
7 the Indian Tribes; . . . ." While much judicial writing has addressed the extent of congressional  
8 power to regulate interstate commerce, the federal courts have had much less opportunity to  
9 interpret congressional power to regulate foreign commerce. Those decisions that have  
10 addressed this aspect of congressional power, however, have uniformly recognized its breadth,  
11 even when compared to congressional power over interstate commerce. The Supreme Court, for  
12 example, has found "evidence that the Founders intended the scope of the foreign commerce  
13 power to be . . . greater than the interstate commerce power." *Japan Line, Ltd. v. County of Los*  
14 *Angeles*, 441 U.S. 434, 448 n.13 (1979). The Ninth Circuit has described the Supreme Court as  
15 "unwavering in reading Congress's power over foreign commerce broadly." *Clark*, 435 F.3d at  
16 1113. Indeed, the Ninth Circuit noted in *Clark* that the Supreme Court had read the Foreign  
17 Commerce Clause as granting Congress "sweeping powers," and that it had yet to strike down an  
18 Act of Congress on Foreign Commerce Clause grounds. *Id.*

19 Unlike congressional regulation of interstate commerce, which commonly raises thorny  
20 and historically fraught issues of states' rights and national power, the congressional regulation  
21 of foreign commerce has never seen any judicial retreat from an expansive reading of the Foreign  
22 Commerce Clause. *Id.* Hardeman argues that Congress's power under the Foreign Commerce  
23 Clause is "in some ways broader" but "in some ways narrower" than Congress's power to  
24 regulate interstate commerce. Hardeman's Motion at 3. This is incorrect. There is no way in  
25 which Congress's power to regulate foreign commerce is narrower than its power to regulate  
26 commerce among the states. Hardeman relies on a single law review article in which a professor  
27 writes that Congress faces issues of extraterritoriality and international law that constrain its  
28 ability to legislate conduct in foreign countries in ways that would never arise within United

1 States borders. Hardeman’s Motion at 4 (*quoting* Anthony J. Colangelo, The Foreign Commerce  
 2 Clause, 96 Va. L. Rev. 949, 954 (2010)). But the Ninth Circuit has addressed the  
 3 extraterritoriality and international law issues that concern Prof. Colangelo under the  
 4 Constitution’s Due Process Clause and international law, not under the Foreign Commerce  
 5 Clause. *See Clark*, 435 F.3d at 1106, 1108; and *United States v. Thomas*, 893 F.2d 1066, 1068-  
 6 69 (9th Cir. 1990). And even in those cases, the Ninth Circuit has defined Congress’s power  
 7 broadly, holding for example that Congress can penalize its citizens’ extraterritorial crimes  
 8 without running afoul of due process. *Clark*, 435 F.3d at 1108-09. Under no logical  
 9 interpretation of the applicable jurisprudence can one conclude that Congress possesses less  
 10 constitutional power to regulate foreign commerce than it does to regulate interstate commerce.  
 11 Nor do decisions in the Ninth or other Circuits support the division of congressional power under  
 12 the Foreign Commerce Clause into “inward-looking” and “outward-looking” activities, as  
 13 Hardeman does.

14 The Court should find that Congress possesses broad power to regulate foreign  
 15 commerce, and that this power is in all respects broader than that granted to Congress by the  
 16 Interstate Commerce Clause.

## 17 **II. THE NINTH CIRCUIT’S FRAMEWORK FOR FOREIGN COMMERCE** 18 **CLAUSE ANALYSIS.**

19 While the Supreme Court has generally adhered to a three-category framework of  
 20 Congress’s power to regulate interstate commerce – (1) the use of the channels of interstate  
 21 commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate  
 22 commerce; and (3) activities that substantially affect interstate commerce – the Ninth Circuit has  
 23 taken a more general, and in its view more commonsense approach to Foreign Commerce Clause  
 24 analysis. *Clark*, 435 F.3d at 1103. The Ninth Circuit asks “whether the statute bears a rational  
 25 relationship to Congress’s authority under the Foreign Commerce Clause,” when viewed as a  
 26 whole. *Id.* at 1114. This approach follows the Supreme Court’s broad reading of congressional  
 27 power in *Gonzales v. Raich*, 545 U.S. 17, 22 (2005), where it held that applying the “rational  
 28 basis” analysis was a “modest” task that did not involve delving into whether the respondent’s

1 activities, taken in the aggregate, actually had a substantial effect on interstate commerce.  
2 Following this approach, the Supreme Court concluded that Congress could regulate purely  
3 intrastate activity “that is not itself ‘commercial,’ in that it is not produced for sale, if it  
4 concludes that failure to regulate that class of activity would undercut the regulation of the  
5 interstate market in that commodity.” *Raich*, 545 U.S. at 18.

6 Thus, in *Raich*, the Supreme Court rejected the respondents’ attempt to argue that  
7 Congress’s regulation of the purely intra-state cultivation and use of marijuana exceeded its  
8 Commerce Clause power as “myopic” and a misreading of its earlier Commerce Clause decisions  
9 in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598  
10 (2000). The Supreme Court emphasized that where a class of activities is regulated and is within  
11 the reach of federal power, courts “have no power to excise, as trivial, individual instances of the  
12 class.” *Raich*, U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

13 This rebuke from *Raich* of a litigant’s attempt to excise an intra-state component of a  
14 statute that was otherwise clearly within Congress’s Commerce Clause power resonates here, as  
15 Hardeman attempts to excise a “non-commercial” component of 18 U.S.C. § 2423(c) from a  
16 statute that he otherwise concedes falls within Congress’s Foreign Commerce Clause power.

17 Though the Ninth Circuit in *Clark* took pains to divorce its analysis from the typical  
18 three-category Commerce Clause analysis, it nevertheless applied a foreign-commerce version of  
19 that analysis to section 2423(c). *Clark*, 435 F.3d at 1116. In so doing, the Ninth Circuit  
20 suggested that the statute was a proper regulation of the channels of foreign commerce, because  
21 the crime required international travel. *Id.* This analysis is critical here, because the Ninth  
22 Circuit’s reasoning was without regard to whether the sex act on foreign soil was commercial or  
23 non-commercial, and without regard to whether the travel was undertaken with the specific intent  
24 to commit the criminal sex act. *Id.*<sup>1</sup>

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25  
26  
27  
28 <sup>1</sup> Indeed, given this analysis in *Clark*, it is surprising that Hardeman reads *Clark* as a  
strong endorsement of his Foreign Commerce Clause challenge. Hardeman’s Motion at 1.

1 **III. CONGRESS DID NOT EXCEED ITS FOREIGN COMMERCE CLAUSE POWER**  
2 **BY CRIMINALIZING ILLICIT “NON-COMMERCIAL” SEX ACTS IN**  
3 **FOREIGN COUNTRIES.**

4 **A. Supreme Court Precedent Supports Congress’s Power.**

5 The Supreme Court’s guidance in *Raich*, the Ninth Circuit’s decisions in *Clark* and  
6 earlier cases, and consistent authority from across the nation support the conclusion that  
7 Congress has the power, under the Foreign Commerce Clause, to subject Americans who travel  
8 abroad and have sex with minors to criminal prosecution. In *Raich*, the Supreme Court held that  
9 a statute can reach purely intrastate commerce and still pass Commerce Clause muster if  
10 Congress had a rational basis to conclude that the prohibited activity, in the aggregate,  
11 substantially affected interstate commerce. *Raich*, 545 U.S. at 22. And if Congress had a  
12 rational basis for believing that by failing to regulate a purely intrastate transaction, it would  
13 leave a “gaping hole” in a statutory scheme that regulates interstate commerce in the broader  
14 sense, then the Court must uphold the entire statutory scheme. *Id.*

15 In this case, Congress had a rational basis to believe that prohibiting Americans from  
16 traveling to foreign countries to pay for sex with children, while allowing Americans to travel to  
17 foreign countries to have sex with children without paying for it, would leave a gaping hole in a  
18 statutory scheme that was intended to criminalize sex tourism. In enacting section 2423(c),  
19 Congress made clear that its purpose was not to distinguish between Americans who travel  
20 abroad and have sex with children based on whether they paid for it or not, but to attack a  
21 growing and thriving international sex tourism industry, under which children – particularly in  
22 poor countries – are exploited by Americans who know that local governments will often turn a  
23 “blind eye” to their conduct. House Report on the Sex Tourism Prohibition Improvement Act of  
24 2002, H.R. Rep. No. 107-525, 107th Cong., 2nd Sess., 2002 at 2-3. The commerce effect of this  
25 statute is not limited to whether money changes hands before or after the sex act, but rather  
26 reaches a global sex tourism industry that allows sexual predators to travel across borders and  
27 commit violent crimes with impunity.

28 The Court should find that the Supreme Court’s decision in *Raich* supports Congress’s  
power to penalize sex tourism, whether the sex acts at issue are paid for or not.



**B. Ninth Circuit Precedent Supports Congress's Power.**

The Ninth Circuit's decision in *Clark* support's Congress's power to prohibit "non-commercial" illicit sexual conduct under section 2423(c). Though the *Clark* opinion restricted itself to the so-called "commercial prong" of section 2423(c), the Ninth Circuit also noted with approval the district court's "good argument" that under a channels of commerce theory, the defendant's travel in foreign commerce before engaging in illicit sexual conduct would satisfy the Foreign Commerce Clause, irregardless of whether the sex act itself is commercial, or whether the defendant intended to commit the sex act while traveling. *Clark*, 435 F.3d at 1116. In reaching this conclusion, the Ninth Circuit relied on its earlier opinion in *United States v. Cummings*, 281 F.3d 1046, 1050 (9th Cir. 2002), where it rejected a Commerce Clause challenge to the International Parental Kidnapping Crime Act because the Act criminalized conduct that necessarily involved the use of a channel of foreign commerce; namely, the child's transportation out of the country, even though the actual criminal act took place after the travel had ended. *Id.*

Like the statutes at issue in *Clark* and *Cummings*, the criminal conduct at issue here necessarily involves travel in foreign commerce. That the actual criminal sex act takes place after the travel has ended is of no constitutional moment. The Ninth Circuit has never conditioned its Foreign Commerce Clause analysis on whether a defendant intended to commit the criminal act while traveling. The Ninth Circuit made clear in *Clark* that the only reason it did not address the non-commercial prong of section 2423(c) in that case was judicial restraint, not because of any implicit doubt about its Foreign Commerce Clause validity. *Clark*, 435 F.3d at 1110 n.16. This Court should hold that under *Clark*, Congress's regulation of non-commercial illicit sexual conduct by Americans who travel abroad is likewise within its Foreign Commerce Clause power.

**C. Other Federal Courts Have Already Recognized Congress's Power to Regulate Non-Commercial Illicit Sexual Conduct.**

Persuasive authority from other jurisdictions has already rejected Hardeman's argument that the non-commercial prong of section 2423(c) violates the Foreign Commerce Clause. The Third Circuit recently addressed this issue in an unpublished opinion called *United States v.*

1 *Bianchi*, 386 Fed.Appx. 156, 2010 WL 2650357 (3rd Cir. 2010). In that case, the American  
 2 defendant traveled to various former Soviet-Bloc countries and had sex with young boys. He  
 3 challenged both the commercial and non-commercial prongs of section 2423(c) on Foreign  
 4 Commerce Clause grounds. *Id.* at 161. With respect to the statute’s commercial prong, the Third  
 5 Circuit followed the Ninth Circuit’s decision in *Clark*. *Id.* at 161-62. With respect to the  
 6 statute’s non-commercial prong, the Third Circuit also rejected the defendant’s challenge, noting  
 7 that he had failed to show why Congress would not have had a rational basis to believe that  
 8 failing to regulate the non-commercial sexual abuse of minors by Americans in other countries  
 9 would leave a “gaping hole” in a comprehensive statutory scheme directed at combating sex  
 10 tourism. *Id.* at 162.

11 A district court in Texas also upheld the non-commercial prong of the section 2423(c)  
 12 against a Foreign Commerce Clause challenge, in *United States v. Martinez*, 599 F.Supp.2d 784,  
 13 802 (W.D. Tex. 2009). There, the district court followed the Supreme Court’s guidance in  
 14 *Raich*, and examined the history and purpose for the sex tourism statutes. *Id.* at 806. Section  
 15 2423(c), the district court noted, was enacted as part of the PROTECT Act of 2003, which was  
 16 intended to implement the “Optional Protocol” to the Convention on the Rights of the Child on  
 17 the Sale of Children, Child Prostitution, and Child Pornography. That treaty, like the PROTECT  
 18 Act, was “designed to combat the human suffering and economic evils of worldwide sex tourism  
 19 and child prostitution.” *Id.* at 807-808. The district court thus had “no difficulty concluding that  
 20 Congress had a rational basis for believing that failure to regulate the non-commercial sexual  
 21 abuse of minors ‘would leave a gaping hole’ in the PROTECT Act and its ability to regulate the  
 22 commercial industry of child prostitution.” *Id.* at 808.

23 A third decision, this one by a district court in Delaware, has also upheld the non-  
 24 commercial prong of section 2423(c) against a Foreign Commerce Clause challenge. *United*  
 25 *States v. Pendleton*, 2009 WL 330965, \*4 (D. Del. 2009). The *Pendleton* court largely followed  
 26 the same line of reasoning as the other decisions discussed above, noting – like the Ninth Circuit  
 27 in *Clark* – that travel through channels of foreign commerce satisfied the Foreign Commerce  
 28 Clause, even if the crime at issue took place after the travel had ended. *Id.*

1 This commonsense conclusions reached by these federal courts apply with equal force to  
 2 Hardeman’s challenge. If Congress intended the PROTECT Act to impose stiff penalties on  
 3 Americans who engage in sex tourism, why would Congress construct a statutory scheme that  
 4 penalized Americans who travel abroad and rape children after giving them pieces of candy, but  
 5 ignored Americans who engaged in identical conduct but without the candy? And what purpose  
 6 would the statutory scheme serve if prosecutors were forced to tease out which child rapes were  
 7 “on account of” gifts or payments within the meaning of 18 U.S.C. § 1591(e)(3), and which were  
 8 not? Congress had a rational basis to conclude that a comprehensive punitive scheme addressing  
 9 sex tourism, which in the aggregate affects foreign commerce in undeniable ways – for example,  
 10 through travel across borders, payments made to local hotels and restaurants and otherwise  
 11 dispersed through local economies, and ultimately through payments to victims and their  
 12 “handlers” for sex – would have to address all of the criminal sex acts that Americans committed  
 13 overseas, not just those that involved commercial exchanges.

14 Hardeman attempts to ridicule these decisions as containing “astonishing non-sequiturs,”  
 15 “accelerating down the wrong track,” propagating “nonsense upon stilts,” and perpetrating  
 16 “shocking” leaps of illogic. Hardeman’s Motion at 14-15. But these attacks cannot negate the  
 17 basic logic underlying this statutory scheme. International sex tourism is a global market that  
 18 involves numerous commercial transactions of many types that occur in many countries, of  
 19 which the payment for sex is only one example.<sup>2</sup> A sex tourist may pay a child for sex one day,  
 20 and then rape him for free the next. To excise a single type of crime from the statutory scheme as  
 21 free from congressional reach just because it did not involve a commercial exchange, would be  
 22 more worthy of ridicule than the consistent, well-reasoned judicial opinions that Hardeman  
 23 attacks.

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24  
 25 <sup>2</sup> Numerous articles have described the growth of the sex tourism industry, which  
 26 includes both a highly organized commercial market of sex tour operators, as well as individuals  
 27 who travel on their own, seeking opportunities for illicit sexual conduct with minors. *See, e.g.,*  
 28 Mark Orndorf, *The Secret World of Child Sex Tourism*, 28 Penn St. Int’l L. Rev. 789, 793 (Spring  
 2010); R. Barri Flowers, *The Sex Trade Industry’s Worldwide Exploitation of Children*, 575  
 Annals Am. Acad. Pol. & Soc. Sci. 147 (2001).

1 The Court should find that Congress's regulation of non-commercial sex acts by  
 2 American sex tourists traveling abroad is a rational part of a comprehensive national statutory  
 3 scheme to combat child sex tourism and child prostitution, and that these crimes involve the use  
 4 of channels of foreign commerce, substantially affect foreign commerce, and fall plainly within  
 5 Congress's constitutional power to regulate foreign commerce.

6  
 7 **IV. THE NECESSARY AND PROPER CLAUSE ALSO SUPPORTS CONGRESS'S  
 POWER TO PASS SECTION 2423(c) IN ITS ENTIRETY.**

8 The United States' international treaty obligations provide another reason for Congress to  
 9 pass a comprehensive anti-sex tourism statute. The Constitution gives the President the authority  
 10 to enter into treaties with foreign nations, subject to ratification by the Senate. U.S. Const. Art.  
 11 II, Sec. 2, cl. 2. Article VI, Clause 2 of the Constitution gives Congress the power to enact  
 12 legislation that implements treaties under the "Necessary and Proper Clause." *Missouri v.*  
 13 *Holland*, 252 U.S. 416, 432 (1920). A treaty cannot enhance the power of the federal  
 14 government beyond that stated by the Constitution, and it cannot deprive citizens of rights  
 15 guaranteed by the Constitution; but treaties can authorize Congress to legislate on "matters"  
 16 which Congress might otherwise be unable to address. *Reid v. Covert*, 354 U.S. 1, 17-19 (1957);  
 17 *United States v. Lara*, 541 U.S. 193, 201 (2004).

18 The district court in *Martinez* expressly recognized the United States international  
 19 commitments relating to the sexual abuse and sexual exploitation of children, including the  
 20 United States' commitment under the Optional Protocol. *Martinez*, 599 F.Supp.2d at 807-08.  
 21 The Optional Protocol, which the United States Senate ratified on June 18, 2002, recognized that  
 22 the signatory nations are "[d]eeply concerned at the widespread and continuing practice of sex  
 23 tourism, to which children are especially vulnerable." Optional Protocol, Preamble, 148 Cong.  
 24 Rec. S5717-01. While the Optional Protocol specifies that signatories must prohibit commercial  
 25 sale of children, child prostitution, and child pornography, it more generally requires parties to  
 26 the agreement to ensure that acts involving "sexual exploitation of the child" are "fully covered  
 27 under its criminal or penal law, whether these offences are committed domestically or  
 28 transnationally or on an individual or organized basis" and further specifies that "[e]ach State

1 Party shall make these offences punishable by appropriate penalties that take into account their  
 2 grave nature.” Optional Protocol, Article III. The Optional Protocol also recognized the need for  
 3 a “holistic approach” to eliminate the sexual exploitation of children. Optional Protocol,  
 4 Preamble.

5 Section 2423(c) is consistent with these treaty obligations, whether the sex acts are  
 6 commercial or not. *See United States v. Frank*, 486 F. Supp. 2d 1353, 1356-58 (S.D. Fl. 2007)  
 7 (finding Congress could enact Section 2423(c) under the Necessary and Proper Clause to  
 8 implement the Optional Protocol); *Pendleton*, 2009 WL 330965 (finding that 2423(c) and (f)(1)  
 9 are “necessary and proper” to the implementation of the United States’ international treaty  
 10 obligations); *Martinez*, 599 F.Supp.2d at 808 (same).

11 The Court should find that the Necessary and Proper Clause provides an alternate source  
 12 for Congress’s power to enact both the commercial and non-commercial prongs of section  
 13 2423(c).

#### 14 CONCLUSION

15 For the reasons set forth above, the Court should find that section 2423(c) passes  
 16 constitutional muster and deny Hardeman’s motion to dismiss Count One of the Indictment.

17  
 18 DATED: May 10, 2011

Respectfully submitted,

19 MELINDA HAAG  
 20 United States Attorney

21 /s/

22 

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24 /s/

25 

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